

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
RICHTONE DESIGN GROUP, L.L.C, : Docket #22cv1606
Plaintiff, :
- against - :
KELLY, et al., :
Defendants. : New York, New York
October 19, 2022

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PROCEEDINGS BEFORE
THE HONORABLE ANDREW E. KRAUSE,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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None					

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

THE CLERK: Good morning, all. This is the matter of Richtone Design Group v. Kelly, et al., docket number 22cv1606. The Honorable Andrew Krause presiding. Counsel, please note your appearance for the record starting with plaintiff's counsel.

MR. ROMEO SALTA: Romeo Salta, of counsel for Knull P.C., 630 Ninth Avenue, New York, New York. Good morning, Judge.

THE COURT: Good morning, Mr. Salta. And you are?

MR. SEAN GALLAGHER: Sean Gallagher.

THE COURT: Oh, good morning, Mr. Gallagher, okay.

MR. GORDON TROY: Good morning, Your Honor, Gordon Troy here for the defendants and the counterclaimants. One point is I'm not sure why Mr. Salta's here as - he filed a notice of appearance just yesterday, and my discovery dispute, which is what this hearing is about, is with Mr. Knull who should be here.

THE COURT: Okay, well --

MR. TROY: I've never communicated --

THE COURT: Good morning, first of all, let's start with that.

MR. TROY: Okay.

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2 THE COURT: Your discovery dispute is with the
3 plaintiff and whoever's representing the plaintiff.
4 It's not with Mr. Knull. I mean I understand the point
5 that Mr. Knull is the person with whom you've been
6 corresponding, but the dispute is with plaintiff/third-
7 party defendant Richtone and Mr. Gallagher. So we'll
8 see. I mean if Mr. Salta is not prepared to address
9 those issues, we're going to have a problem, but
10 hopefully Mr. Salta is prepared to address those issues.
11 I assume that Mr. Salta has been fully briefed on all of
12 this by Mr. Knull and that he'll be prepared to address
13 the issues, and if not, then we'll revisit this concern.
14 Okay?

15 MR. TROY: Thank you, Your Honor.

16 THE COURT: Very good. Everyone can be seated.

17 MR. SALTA: Thank you, Your Honor.

18 THE COURT: You can feel free to sit during
19 this proceeding. We'll be going back and forth. I know
20 some lawyers do not feel comfortable sitting when
21 addressing the Court, I was that way, but I don't want
22 you to be constantly feeling the need to stand up and
23 down just for my benefit. So you are granted permission
24 to either sit or stand, whichever makes you more
25 comfortable.

MR. TROY: I'll try not to act like a jumping bean.

THE COURT: It's okay. Again, I understand, some people are just not comfortable sitting when addressing the Court. I definitely understand that. Whatever we do just make sure we speak clearly and into the microphone so that we can make a clear recording of the proceeding today and have a good record in case anybody needs to take any objections to Judge Karas.

All right, so I have reviewed the letters. We were last together on, well, I guess really just Mr. Troy and I were last together on September 7, and there are some disputes that are percolating here, and we'll go through them. I'll hear from the parties on those issues. I mean, Mr. Salta, I saw your notice of appearance yesterday. Can you just confirm that I'm correct that you are fully briefed on all of the disputes and prepared to address them today?

MR. SALTA: I feel that I am fully briefed.

THE COURT: Okay. Hopefully that is accurate, and we'll see where we go. So as I see it, there are two main issues that have been raised in an appropriate way as far as the discovery disputes go. That is with respect to the plaintiff/third-party defendants'

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2 interrogatory responses and the response from this side
3 of the courtroom to the demand for inspection of the
4 negatives and photographs. There's a bit of a sort of
5 back and forth in the submissions about requests for
6 communications from this group of individuals who have
7 been described by Mr. Troy as litigation funders. We
8 will touch on that briefly, but I will say that to the
9 extent Mr. Troy was attempting to raise that as a
10 discovery dispute, he didn't really do it in the way
11 that I would have expected. So I'm not sure if that is
12 really ripe for my view.

13 The reason I say that is because - I'm sorry, I
14 should've said Mr. Knull didn't raise that in the way
15 that I would've expected because the reason I say that
16 is because letters raising affirmative discovery
17 disputes were due on October 12, and Mr. Troy submitted
18 his letter raising various disputes on October 12. In
19 Mr. Knull's response on October 15 at ECF number 22, he
20 does allude to this issue regarding the Pilates
21 Transparency Project, and that prompted a further
22 response from Mr. Troy on October 17 saying that he
23 interpreted that letter, ECF number 22, as an attempt by
24 Mr. Knull to seek discovery of private communications of
25 the defendants and individual who may be part of the

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2 Pilates Transparency Project.

3 Again, if Mr. Knoll is seeking to raise that as
4 a discovery dispute for the Court to resolve, it
5 should've raised it in his letter on October 12. He
6 also should've, or he should (indiscernible) the letter
7 on October 12 raising the issue, he also should've been
8 more transparent about it if that's what he was doing.
9 So I'm not really sure I have enough information before
10 me to really address that point. We'll come to that at
11 the end if necessary.

12 As I've alluded to here, I have reviewed the
13 parties' submissions, ECF numbers 21, 22, and 23. I've
14 reviewed some of the supporting material, although,
15 frankly, some of the ways in which the issues were
16 presented here in your submission, Mr. Troy, were a
17 little difficult for me to follow. But that's fine,
18 we'll be able to walk through them today.

19 We'll start with the question of the
20 interrogatories, and I see from the letter that there
21 are one, two, three, four, five, six, seven
22 interrogatories in dispute. And we'll go through them
23 one at a time. The main thrust of the response from Mr.
24 Knoll was that the interrogatories only appeared to
25 relate to the counterclaims or certain counterclaims. I

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think Mr. Troy took exception to that characterization, and that doesn't really seem correct to me and it doesn't seem like an appropriate basis to object to responding to them. That's where I come to from what I've read so far.

But, Mr. Troy, let me turn to you, let's start generally if there are other sort of objections or concerns that have been raised that apply broadly to all of the interrogatories, I'll be curious to hear that from your perspective. And then if not we'll just go through them one by one.

MR. TROY: Well, first of all, Your Honor, please accept my apologies for making this more confusing than it was. Actually, I was trying to prepare for this letter and looking at the numerous back and forths regarding these issues, and because they weren't orderly, I thought that it would be easier for the Court if I pulled each of those sections together which is what I put, tried to put together in the first I think six exhibits --

THE COURT: Right, I actually really appreciate what you tried to do. I could tell what you tried to do. But the thing that was confusing about it was it left me a bit at sea as to what the current state of the

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2 dispute was because there's a lot of back and forth.
3 It's sometimes hard for me to interpret from all of the
4 back and forth where everybody landed. And part of the
5 problem with Mr. Knull's response is he doesn't really
6 articulate very clearly what his position is on some of
7 these things, and maybe that's part of your issue as
8 well, I don't know. So we'll have to hear from
9 everybody about that. Again, I appreciate what you
10 attempted to do, and it didn't quite work, but it's not
11 for lack of effect.

12 MR. TROY: And to answer your question, Your
13 Honor, I think the landing is we have not moved the
14 needle in any direction here. There are a couple of
15 instances, as you go through each of these where Mr.
16 Knull has said that maybe he might find something else.
17 But the objections are just, as I go around and around
18 with them, I've actually never seen these kinds of
19 volume of objections.

20 But let's go - I know that we're not here to
21 discuss the substantive issues of the case, but
22 obviously the discovery has to do with the substantive
23 issues of the case.

24 THE COURT: Sure.

25 MR. TROY: And what we have here is that the

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2 plaintiffs have sued my clients for copyright
3 infringement, and based upon everything I know about the
4 world of Pilates and having been involved in a five-year
5 lawsuit previously than Mr. Gallagher was involved in
6 with his prior company, I have a wealth of knowledge
7 about a lot of the history as it pertains to Pilates and
8 Mr. Gallagher's claims, etc., etc.

9 Overlay on top of that, sir, that we in, on
10 behalf of another client, as far back as 2017, and I
11 actually included the letter from Mr. Knull - I didn't
12 want to bore you with my communications - but back in
13 2017 the thrust of the argument at the time versus now
14 has been that because Mr. Gallagher possesses negatives
15 that he under the 1909 Copyright Act, which if
16 applicable to these older works, that he is the de
17 facto, ipso facto, take your choice of words, owner of
18 the copyright. And as you know or from copyright law is
19 that owning a copy and owning a copyright are two
20 different things.

21 So what our affirmative defenses and our
22 counterclaims are, even though they're wrapped around
23 legal theories because that's a necessity of such, the
24 thrust of them is challenging --

25 THE COURT: The validity of the copyright.

MR. TROY: -- the validity of the copyright.

THE COURT: Right.

MR. TROY: Plain and simple. And to do that we are seeking to inspect the actual negatives, and I parenthetically point out that in the prior Pilates Inc. v. Current Concepts case which was decided by Judge Cedarbaum in 2000, plaintiff's claim was that because they got all these, quote, "archives" that were supposedly memorialized in the 1992 copyright registration filed by Mr. Gallagher, that they had goodwill and because that case involved trademarks. The focus was, well, whether or not this body of material constituted goodwill, and Judge Cedarbaum completely rejected that there was any goodwill associated with it.

But my point is that at the time with Mr. Gallagher's then counsel, I met with him in his conference room in his offices in Manhattan, and he had several boxes of materials that he showed to me, and there was not one negative amongst them. And now all of a sudden we look 17 years later, that the claim to the copyright is because of the possession of the negatives which is why I have a complete right to inspect these negatives.

Then as far as the interrogatories themselves,

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what we're trying to ascertain is which of these images is there a valid claim of copyright by Mr. Gallagher, and I think that's a perfectly reasonable question to ask --

THE COURT: Let me ask you this question. I understand what you're saying, I appreciate some of the background because it's helpful for context. When it comes to the allegations by the plaintiff with respect to infringement, are those focused on particular photographs or particular images of some sort?

MR. TROY: To answer your question, Your Honor, they sued on two photographs only; however, plaintiff has a history of takedown --

(interposing)

THE COURT: No --

MR. TROY: -- against defendant.

THE COURT: Okay, but this case is about, from the plaintiffs' perspective at least, it's not two photographs, right?

MR. TROY: Plaintiff, that is plaintiff's perspective, but they used under two copyright registrations which I have the absolute right to challenge. And those copyright registrations encompass more than just the two photographs. Somewhere around

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2 2,000 photographs.

3 THE COURT: Okay. And your counterclaim, as to
4 the invalidity of, counterclaim/third-party complaint as
5 to the invalidity of the copyright, is it your position
6 that that counterclaim encompasses all 2,000 photographs
7 or just the two photographs that are at issue in this
8 case, the two photographs that are alleged in the
9 operative complaint?

10 MR. TROY: Everything, Your Honor.

11 THE COURT: Okay.

12 (interposing)

13 THE COURT: So just in terms of, because the
14 parties clearly have different views as to this.
15 Plaintiff would like to limit this case to make it just
16 about two photographs, but your position is that the
17 counterclaim/third-party complaint is much broader than
18 that. It's about, if it were just the counterclaim,
19 that might be tricky, but certainly if there's a third-
20 party complaint, which there is although the way it's
21 put together in one document is slightly unusual, it is
22 meant to encompass the entirety. So, in other words,
23 the counterclaim/third-party complaint is much broader
24 than the complaint filed by the plaintiff.

25 MR. TROY: Correct, Your Honor.

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THE COURT: Okay.

MR. TROY: If you don't mind --

THE COURT: Go ahead.

MR. TROY: -- I'd like to add to that, I mean if plaintiffs had a problem with the scope of what is I think is pretty clear in our answers, affirmative defenses and third-party complaint, then the proper procedure would've been to file either a motion to dismiss or motion for summary judgment at an early stage in this case. We are in the midst of discovery, and I am entitled to pursue what amounts to our defenses which is an offense.

THE COURT: Well, but I mean let's not blend the points together because the defenses are defenses as to the claims that were alleged against you. The counterclaim/third-party claim is offense, it's not just your defenses, and there you would be, again, if you were - I'm looking, the reason I keep looking at the computer is I've pulled up the docket and I'm looking at the counterclaim and third-part complaint specifically. But we are now within the confines of this one proceeding which encompasses both the plaintiff's original claims and the defendant's original defenses but also the counterclaim and third-party complaint.

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2 So you may or may not be entitled to certain
3 discovery as to defenses and then you may or may not be
4 entitled to other discovery as to counterclaims and
5 third-party claims. So we're in a single proceeding
6 where all of this is blended together, but it's
7 important to draw appropriate distinctions between the
8 defenses and the counterclaims inasmuch as the response
9 to the discovery demands seems focused on the procedural
10 aspects of it which I'm not sure is meaningful
11 considering we have a single proceeding.

12 But if we were in a universe where the
13 complaint only related to two photographs and there were
14 no counterclaims or, that there were no third-party
15 complaint, then we might have a much narrower scope of
16 discovery. But that's not the world in which we are
17 living because there is, in fact, a third-party
18 complaint and there are, in fact, counterclaim. So it's
19 important to just be precise about it, particularly
20 because the plaintiff/third-party defendants' responses
21 and objections to these discovery demands focus on the
22 procedural posture for better or for worse.

23 Okay, let me turn to you, Mr. Salta. I know we
24 haven't started to drill down yet into the particular
25 requests or the particular interrogatories, but I'd like

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2 to hear your perspective because it does seem as though
3 focusing on the notion that the complaint only makes
4 allegations as to two photographs is a bit of a narrow
5 reading of the entire situation.

6 MR. SALTA: Well, actually, we are conceding
7 that 17, I believe 17 pictures are at issue because in
8 the --

9 THE COURT: In your complaint.

10 MR. SALTA: No, in the complaint there's two,
11 but in the, I believe in the counterclaim there is
12 allegations of improper takedowns involving 15
13 photographs. So we were concentrating on those, and
14 then in the third counterclaim the defendant expanded
15 the horizon to include everything as well as, you know,
16 and basically the objection is grounded -- Mr. Tory's
17 correct that we have to talk a little bit about the
18 subject matter of the case here. We have a 30-year-old,
19 we have a 30-year-old registration here, copyright
20 registration. Never had a problem. There's never been
21 a case that I'm aware of copyright fraud where a
22 copyright was illuminated because of fraud.

23 What's happening here, and I must say this, is
24 there are these people, there's a campaign afoot, the
25 Transparency Project is a campaign. It's not just a

1 funding project like your typical funder who invests in
2 litigation. This is a campaign for them, and they're
3 making a lot of money. And they're alleging --

4 THE COURT: Who's making a lot of money?

5 MR. SALTA: Well, the defenses, the defense for
6 one is making a lot of money, and the purpose of --

7 THE COURT: Meaning he's being paid to
8 represent somebody? I mean come on. Let's not throw
9 around attacks; let's focus on what we're actually
10 talking.

11 MR. SALTA: All right. So basically there's a
12 fishing expedition going on here, and it's quite
13 egregious. First of all, with regard to the trademark
14 case that Mr. Troy alluded to, he didn't ask for
15 negatives. We got negatives, we have negatives. He can
16 see the negatives. We have no problem with that. He
17 wants to take pictures of all of the documents. Now, we
18 don't trust them for one --

19 THE COURT: Okay, let's deal with that issue
20 first because this one doesn't seem terribly complicated
21 to me. Why - if your concern is that the photographs or
22 the pictures of the photographs or the pictures of the
23 negatives are going to be used improperly either by the
24 named defendants here or people who are affiliated with
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them in some way or who are spiritually aligned with them or who have common interests of one sort or another, why can't that be addressed by a confidentiality agreement and protective order?

MR. SALTA: At least we will need that, I agree.

THE COURT: Well, that's easy. As I point out, you weren't at my initial conference in this case with the parties in early September, but as I always point out in any case that's referred to me for general pretrial supervision, I have a sample confidentiality and protective order on my webpage on the court's website. That covers the issues that need to be covered in 98 percent of all cases that appear before me for one sort of another, including large complicated, multimillion dollar litigations. Hold on. Hold on.

But I always tell parties that if there are particular protections that are necessary for this case, you're free to take that sample confidentiality and protective order, make your proposed changes to it, submit it as a redlined document for my review, and I'll review it. And if it requires strict protections to ensure that documents, photographs, or whatever they might be are not shared beyond the litigation or, that's

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what a confidentiality order does in the ordinary course of business, that if there's something that needs to be further implemented, an attorney's eyes only provision or something like that, there are a lot of ways to address that.

So the notion that somehow an inspection of the photographs or the inspection of the negatives is a threat to the plaintiffs/third-party defendant because of the possibility of improper dissemination of those photographs, that really should be something that we can easily address.

MR. SALTA: Confidentiality order at the very least, Your Honor, but there is - but we're objecting to photographs taken of them. He can have experts look at them to see if the negatives are genuine, he can look at the submission, he can look at everything. But we don't - we just believe that the photographs themselves should not be duplicated in any way.

THE COURT: Okay. So let's just, since we're focused on this, why do you need, Mr. Troy, to take photographs of the photographs? I mean an inspection, very often the purpose of the inspection is to actually inspect the originals and to determine if anything needs to be done with those or arguments need to be made. I

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2 mean you've represented that you yourself are a
3 photographer, so that's great. I mean if there's going
4 to need to be some sort of expert testimony in this
5 case, it's not going to come from you. Presumably there
6 would be a witness. But in any case, it's not entirely
7 clear to me why photographs of the negatives would be
8 relevant in this case.

9 MR. TROY: First of all, Your Honor, I'm not
10 planning on being a witness.

11 THE COURT: I didn't think so. I figured you
12 wanted to continue to be the lawyer.

13 MR. TROY: Yes, I much prefer being a lawyer as
14 I'm a rank amateur photographer if you will.

15 THE COURT: Okay. Well, you're the one who
16 mentioned that you were a photographer.

17 MR. TROY: Well, the point is is that if you
18 look at what we submitted which is 23, 6, 7, and 8,
19 which is a copy of the deposit copy of 1992 registration
20 and if you look at it, most of it is illegible. And if
21 you would prefer, I mean I printed the whole thing out,
22 won't mention the fact that it used up an entire black
23 ink cartridge. My laser printer's pretty big.

24 THE COURT: That's fine. I didn't print it
25 out, so I'm going to open it up on my computer here.

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MR. TROY: And we submitted it in three parts because of the size and the ECF limitations. But you'll see on there, I mean there's a number of issues. One is is that so much of it is completely illegible --

THE COURT: Right, that's why you go and inspect it and look at it.

MR. TROY: Right, but here's the issue, Your Honor, is is that now all of a sudden plaintiff is saying that there's 17 photographs at issue, but there's many more than that for the very simple reason is is that our client has access to a huge volume of materials that plaintiff supposedly claimed copyright in. I mean --

THE COURT: Right, I understand it. I understand the point. You're concerned that even if you prevail in this litigation as to the two or the seventeen photographs, that you'll come back and face another lawsuit a month, a year, three years from now regarding some of photographs which you contend have the same exact copyright issues or limitations that are being litigated here. So it should all be litigated at once.

MR. TROY: Precisely. I mean plaintiff's counsel specifically said one cannot be certain that any

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2 work is available in the public domain and runs the risk
3 of infringement by copying. So plaintiff is the one who
4 has actually brought the entire universe --

5 THE COURT: What are you reading from?

6 MR. TROY: This is in, if you look at my
7 exhibit, and it's ECF 23-4, the bottom of the first page
8 --

9 THE COURT: Okay. I'm concerned more about the
10 pleadings than what counsel represents in discovery
11 dispute letters.

12 MR. TROY: But this is in part what became the
13 pleadings because we were aware of having dealt with
14 plaintiff's counsel for a number, for over five years of
15 that they were basically claiming the entire universe of
16 these materials, and that's what we are challenging.

17 THE COURT: Right, and - okay. Can we just
18 focus for a second on, let's try to do this in as
19 orderly a fashion as possible so that we're not here all
20 day. The first issue that I'm trying to get resolved is
21 why can't you just go inspect these things without
22 photographing them? You're going to be able to inspect
23 them. I don't even really think there's that much of an
24 objection to that.

25 MR. TROY: No, Your Honor. The - because --

(interposing)

THE COURT: The problem is taking photographs of the photographs. If that creates an illegible version that you can't make use of, how are your photographs going to be any more useful?

MR. TROY: Well, I don't think that that's the issue because, Your Honor, simple light table, you stick the negatives on it, you take a photograph of it. Now we memorialize what they are claiming they own. And I have no problem entering into a protective order. I mean we have not claimed the need for confidentiality obligations with anything. So we haven't proposed a protective order. But if plaintiff insists on a protective order and they want to make that attorney's eyes only, I'm absolutely fine with that.

I mean if I'm in a position where I cannot share that with my client because they're fearful that my client will share with other people, then I'll respect that even though I think that they're being a little over the top in their --

THE COURT: That's what this case is about essentially. So be that as it may, you're willing to accept that as a condition, fine. But, and that may be enough to satisfy the plaintiff, I'm not sure, we'll

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come back to that, but I guess maybe I'm having a bit of a hard time understanding. You take the photographs, you make it clearer copies of them using a light table or whatever. Why is that necessary?

MR. TROY: Because this is illegible.

THE COURT: Right, so your point is that for purposes of litigating this case, in order for Judge Karas ultimately to make a determination on summary judgment as to the validity of the copyright, he's going to need to have better photographs? Isn't that a legal question?

MR. TROY: Well, I think that - I actually think that we're talking about trial, we're not taking summary judgment.

THE COURT: Fine.

MR. TROY: But I have to assume that we're going to trial in this case, and discovery requests are designed for having to do to trial. If the situation presents itself where a motion for summary judgment is appropriate, we and plaintiff will obviously proceed accordingly.

THE COURT: Okay, Mr. Salta.

MR. SALTA: Your Honor, my client is perfectly willing to show these documents. I mean if the

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2 defendant wants clearer, a clearer vision of what these
3 documents are, they can come in and inspect, they can
4 use the light table, put the negatives on it. They'll a
5 very clear - there's a clear picture of what it is.
6 There's no reason to take pictures of it.

7 We understand a protective order, a
8 confidentiality order or whatever can be of use, but
9 there's a history here of things bleeding into social
10 media, evidence that has been produced, evidence that
11 has been produced in discovery shows up in --

12 THE COURT: When there was a protective order
13 in place?

14 MR. SALTA: No. No, no --

15 THE COURT: Which is a pretty large
16 distinction.

17 MR. SALTA: Quite frankly, this is large group
18 of people involved. This is not just counsel.

19 THE COURT: But he's the one who's going to
20 have them if it's an attorney's eyes only protective
21 order, and, by the way, if things show up on social
22 media in violation of a protective order, it will be Mr.
23 Troy who has to come in here and answer for that.

24 MR. TROY: And I don't plan on --

25 THE COURT: That would be a bad day for Mr.

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Troy in court. Sanctions would be the tip of the iceberg. Right? I mean that's the whole point of a protective order, especially if it's an attorney's eyes only protective order and especially if the attorney whose eyes would be at issue is sitting here telling me that he would willing to agree, if somewhat begrudgingly because he thinks it's unnecessary, but, nevertheless, would willing agree to that.

So I mean it's a pretty significant accusation to suggest without any real foundation that Mr. Troy is going to go spread this stuff on social media, and if he did, it would be a serious, serious problem.

MR. SALTA: I'm not accusing him of --

THE COURT: Well, he hasn't done anything yet.
(interposing)

THE COURT: -- anticipatorily accusing him of the possibility that that might happen because apparently it happened in other cases where there was no protective order in place which is a materially different scenario.

MR. SALTA: But isn't it true that he would have to show these pictures and tell his clients or whoever he's representing that, oh, this is copyrighted, that isn't, this is, that isn't. And he would, by

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necessity, that's the whole point of the third-party action is to see what they can and cannot use, and he would have to compare.

THE COURT: Well, I mean it's your position that all of these things are subject to the copyright protection.

MR. SALTA: Absolutely.

THE COURT: So I mean what is there to compare? Meaning that there might be some other photographs of Mr. Pilates and his studio that are not within the universe of Mr. Gallagher's copyright --

MR. SALTA: They're worried about future litigation. They're worried about putting something up that they think is not protected and then getting sued or being hit with a takedown order. So they want to see everything. The only way that that would work is if there would be a catalogue of things where Mr. Troy would say these things are protected. These are not, these are.

THE COURT: Well, the other way would work from Mr. Troy's perspective is if he manages to prevail and wins a judgment that none of these photographs are protected by the copyright --

MR. SALTA: God bless if that happens

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THE COURT: But his representation here is that he wants them for purposes of trial ultimately, and that is a big part of what discovery is for, I don't have to tell you that.

MR. SALTA: No.

THE COURT: So with an attorney's eyes only protective order and a scenario where the validity of the copyright as to the entire universe of photographs is at issue, it's hard to understand what the prejudice would be to the plaintiff for having this set of photographs reproduced in a legible, clear format for purposes of potentially use at trial. I mean, of course, the attorney's eyes only protective order would govern the use of those materials throughout the discovery process. It would govern and you could include special provisions.

Of course, this would be subject to Judge Karas' understanding at the time of summary judgment if there is a summary judgment motion how those images would be handled in case any needed to be filed with the court for any particular purpose. Certainly, to the extent any needed to be filed before me for purposes of discovery disputes, I would certainly entertain applications for those to be filed under seal given the

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obvious sensitivities and concerns that Mr. Gallagher has expressed.

So I think when it came to trial, we would have to have a trial in an open courtroom and someone would have to show the photographs, but there's no photography permitted in the courtroom. So it's not as though there would be a risk of those images being reproduced and transmitted as a result of that. Again, I think there are measures that we can easily put in place that Mr. Troy is not even objecting to that would address the concerns on the plaintiff's side.

So unless there are further arguments about that, I think having inspection of these photographs subject to a strict attorney's eyes only protective order and having reproductions in the hands of Mr. Troy for purposes of litigating this case, subject to, and, again, I don't think this is in my standard protective order, but something to this effect is in there, and you could tighten it up even, language about the return of all images or copies at the end of, it's often return or destroy, but I can imagine if, given the sensitivities, if plaintiff were to prevail in this case, a return might be more of a palatable alternative than return or destroy to ensure that the images came back. But,

again, I think there are mechanisms that can easily be put in place that address that concern.

MR. SALTA: Your Honor, if I may add. Destroy is probably more appropriate because --

THE COURT: I'm going to let you work that out.

MR. SALTA: Okay.

THE COURT: You can then present competing versions of it if you can't work it out, but that seems like something I'm going to give you a chance to fix in the first instance.

MR. SALTA: Your Honor, the plaintiff just asked whether or not he, they can inspect everything. He can make duplicate copies of everything with watermarks. Maybe that's one way around it.

THE COURT: Meaning to further, you mean --

MR. SALTA: He can reproduce everything with watermarks, give it to them, they can see that everything is exactly the same. The file that they would get would have watermarks on the picture.

THE COURT: The problem with that, of course, is that it is then cutting across the image that is in dispute. Right? I mean I could see doing that, labeling it in a particular way where it was on the edge of the image or something that didn't interfere with the

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actual --

MR. SALTA: Or something to that effect, yes.

THE COURT: But something that didn't interfere with the actual image, visual work. Right? I mean when I think of a watermark, I think of the draft watermark that cuts across an entire page. I understand the purpose of that. It's to loudly announce that this is not a final version. But if you put a watermark on an image, I know you wouldn't be putting it on the original image, but if you put a watermark on it, it would potentially interfere with one's ability to understand what the actual work at issue is.

I'm open to figuring out some way to address that concern. I understand what the concern is. Maybe because I'm a judge and I believe that my orders will be followed and mainly because they usually are, I am confident that an attorney's eyes only protective order will address the concern about improper dissemination of the photographs because, frankly, if they're disseminated, then I'm generally a pretty mild-mannered, easy going person I think, but a different side of me would come out if we were faced with that circumstance, particularly because we're talking about it candidly and openly in court. Right? So don't mistake my general

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2 good nature for an inability to be ill-tempered when
3 that is required.

4 So there may be a way of trying to identify the
5 documents with some sort of Bates number, which,
6 frankly, might be useful for the litigation if there
7 ever were a trial, saying let's all turn to photograph
8 number 684 in our binder. I've had that trial before,
9 and that's not fun. So it may be worthwhile to have
10 some sort of identifying mechanism somewhere on the
11 documents, but doing it in a way that cuts across the
12 photograph. I understand, Mr. Gallagher, why you'd want
13 to do that because that would be a further protection
14 against dissemination, but I think that's problematic in
15 a copyright case when what the image looks like is a big
16 part of what is at issue.

17 So I am going to allow the inspection. I'm
18 going to allow the reproduction of the photographs
19 subject to an attorney's eyes only protective order
20 which the parties will negotiate and provide to me for
21 review and approval. You are directed to use my
22 standard form protective order as the starting point for
23 your discussions. My hope is that that will cover a
24 significant percentage of what you would need to have
25 included, although I do think you'll need to add an

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attorney's eyes only provision or perhaps make more robust whatever we have in there. I haven't read that recently enough to have it completely committed to memory.

But it's clear that Mr. Troy is amenable to an attorney's eyes provision. He understands the concerns, I well understand the concerns, and they're valid concerns given what this case is about. It absolutely should not be the case that there is any dissemination of these works while this case is ongoing, while we're having an actual live litigation about whether the dissemination any of these images is appropriate or not.

So I think that everybody is clear on that, and I am confident that this can be done in a way that will satisfy the defendant/third-party plaintiffs' need for discovery while also protecting the interests that the plaintiff/third-party defendant has expressed here today.

MR. SALTA: And just a final, Your Honor.

THE COURT: Yes.

MR. SALTA: Will Mr. Tory bring a third-party expert or a photographer to do this? Because --

THE COURT: Despite his own amateur photography skills.

MR. SALTA: Yeah, I just want to know.

THE COURT: Well, you can - I don't need to know that right now. That doesn't seem like a bad idea to me, Mr. Troy, just to have it done once and have it done in as professional a way as possible, with all due respect to your amateur photography skills. But that's not necessarily required. And, frankly, Mr. Gallagher can be present with counsel for the inspection to make sure that nothing is done, I have no concern that you're going to do anything to the negatives, Mr. Tory, but if it would make Mr. Gallagher more comfortable having him and/or his counsel present for that to make sure that the things are handled in an appropriate way. We're talking about very old negatives, and we wouldn't want anything to happen to them. I'm sure both sides would agree that we wouldn't want anything to happen to them. Again, I'm not saying this because I have any concerns about your good faith, Mr. Troy, but these are sensitive and valuable photographs or negatives, and that's why we're having this lawsuit. So having somebody present from plaintiff during the course of the inspection seems like an appropriate additional measure to ensure the proper handling of these materials. So --

MR. SALTA: Agreed, Your Honor.

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2 THE COURT: And whether or not he comes with an
3 expert that's up to him. But you shouldn't expect to be
4 able to do it twice. So if you think at some point an
5 expert is going to be needed, you should bring her or
6 bring him with you. Okay?

7 MR. TROY: Understood, Your Honor.

8 THE COURT: Okay.

9 MR. SALTA: Well, that took a while to address
10 that issue.

11 THE COURT: But I think we've reached a landing
12 place on that. Let's turn to the interrogatories.
13 Again, from my perspective the objection - do you need a
14 minute? It's okay, you can take a minute.

15 (pause in proceeding)

16 MR. SALTA: Your Honor, Mr. Gallagher, would,
17 bringing up the watermarks issue again, he says he can
18 provide copies with watermarks that will not interfere
19 with the actual image. It'll be on the side of the
20 picture or something, that will not interfere with the
21 actual image. But, again, if that's something we have
22 to address in a protective order, we can do it now or --

23 THE COURT: Well, I'm not sure what that means.
24 I'm not sure if Mr. Troy reasonably knows what that
25 means. If something goes on the side on an image that

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doesn't interfere with the image, that seems analogous to putting a Bates number on the bottom right corner.

MR. SALTA: Yeah.

THE COURT: But I'm not sure if it's really going to be that or it's going to be something that is more in the eye of the beholder as to whether it interferes with the image or not. I have no problem with the identify of identifying the photographs. I do have a problem with the idea of the identification marking interfering with the photographs in any meaningful way. And so with that guide and general parameter, I will let you talk about it to try to figure out exactly what should be done and how that can work.

MR. SALTA: Fair enough.

THE COURT: Mr. Troy, you may have objections to any sort of watermark. You've heard what I've had to say. It would be problematic if that interferes with the validity of the image - validity is probably not a good choice of words in a copyright case - but the integrity of the image --

MR. TROY: Your Honor, if I might add, my issue is is that I keep hearing copy, and my point is we need to see originals. And --

THE COURT: But you're going to be making a

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digital copy --

MR. TROY: Digital copy. Right. And I don't have --

THE COURT: You'll be making a copy. So --

MR. TROY: But after we inspect it, that's my point. And I hear Mr. Gallagher through his counsel basically saying, well, we're just going to provide you with copies with, you know, some sort of notation on it.

MR. SALTA: No, you will inspect also.

MR. TROY: Okay, I just want to be clear about that.

MR. SALTA: No, no, no.

THE COURT: I think this is - I think this is just something you can talk about further. I've given you a decent amount of guidance here as to what needs to happen, and if you need to come back to haggle over the particulars of what these copies of the originals will look like, I'll be available for that. And you can present more precise descriptions of you each propose and why what you propose would or wouldn't work. So I'll let you try to work through that a little bit on your own, and if there's further consideration that I need to give to this issue, we'll come back and discuss it next time.

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2 All right, let's talk about the
3 interrogatories. Again, I am prepared to go through
4 each of them, but I think that at the outset it might
5 help to just have a bit of guidance because it may make
6 sense to go back and talk about these amongst yourselves
7 with this guidance rather than going through each
8 interrogatory in turn.

9 The scope of the - well, let me turn to you,
10 Mr. Salta. I mean it seems a part of the objection,
11 sort of the, one of the overarching objections is that
12 the interrogatories are overly broad because they
13 encompass more than the photographs that you believe to
14 be at issue in the case. Is that fair?

15 MR. SALTA: That's pretty much it, Judge.

16 THE COURT: But how is that right? I mean I
17 think you - do you dispute that what the
18 defendant/third-party plaintiff is trying to do is to
19 bring within the ambit of this case the full universe of
20 what is covered by these 1992 copyright registrations?

21 MR. SALTA: Well, that's what they're trying to
22 do.

23 THE COURT: That's what they're trying to do.
24 And do you believe that they have adequately done that
25 through the pleadings? Meaning do they, with their

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2 pleadings, bring those photographs, the entirety of the
3 collection into the case?

4 MR. SALTA: Well, as to the counterclaims, for
5 example, the third counterclaim is - I think it's
6 improper because it brings in, it doesn't really address
7 the documents in issue and brings in a whole other realm
8 of documents, everything in the universe.

9 THE COURT: It does, right, that's what it
10 does. And you think that's improper for a counterclaim
11 because why?

12 MR. SALTA: Well, I think Mr. Knull explained
13 it in his objection saying that there's --

14 THE COURT: Well, he's not here, so you --
15 (interposing)

16 MR. SALTA: -- on a standing issue, on a
17 standing issue, they might be problematic because of the
18 relief that's being requested. They're requesting
19 declaratory relief without any standing to get that kind
20 of relief. Where's the standing for them to allege this
21 when the materials are not in dispute, okay. They're
22 bringing in XYZ that was not part of the takedown
23 pictures or the complaint, and they want to have
24 standing for declaratory relief on extraneous other
25 material. Where's the standing there? This is what

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we're objecting to.

THE COURT: Okay, so are you prepared to file a motion to dismiss on that ground?

MR. SALTA: We would like to.

THE COURT: Okay. Well, that would not be before me. That would be before Judge Karas, and Judge Karas has particular rules with respect to the filing of motions, premotion conference letters and such. So look at those, file your letter. Today is Wednesday. File it by Monday. Okay?

MR. SALTA: Okay, Judge.

THE COURT: Fine. And you'll respond, Mr. Troy, in according with Judge Karas' rules with respect to that. And this goes for the counterclaim but also the third-party complaint, right?

MR. SALTA: Yes.

THE COURT: So you would be seeking to dismiss the third-party complaint and the counterclaim to the extent those pleadings go beyond the 17 photographs that you concede are at issue in your version of the, your interpretation and understanding of --

MR. SALTA: That's the issue, Judge.

THE COURT: Okay. And that's an issue. If you're really ready to move on that, then, you know, Mr.

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Troy, you're right that they didn't move on that before and that's within the scope of discovery as the pleadings currently stand. But this is a 2022 case, we're at an early stage. It's a standing motion which is essentially a subject matter jurisdiction issue, and it really does go to the heart of these disputes.

wouldn't you agree with that?

MR. TROY: Yes, Your Honor.

THE COURT: I mean briefly your argument for why your client has standing to address these other photographs with respect to the copyright and not just the 17 --

MR. TROY: Well, first of all, I'm not quite sure how we've settled on this 17 number because --

THE COURT: All right, that's just a number that he's mentioned. You can all talk about that a little bit more.

MR. TROY: But to answer your question more fully, Your Honor, our client, my client has access to many, many, many, many more photos, and many of them we believe are included in the 1992 copyright filing, and then we have the situation where the 2000 copyright filing doesn't really cover the images that are in there. Because it's a compilation, it only covers the

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2 text and organization. And there's a fundamental
3 difference in what plaintiff keeps asserting in takedown
4 notices when looking at the, what we call the book.

5 THE COURT: Right, there have been - I guess
6 let me just simplify it. As I understand it, the
7 photographs that are specifically at issue in this
8 lawsuit, according to the plaintiff, that's one category
9 of things that your clients have been forced to address.
10 The second concern is there have been takedown notices
11 with respect to other photographs, right?

12 MR. TROY: Correct, Your Honor.

13 THE COURT: Not just the ones that we're
14 talking about here?

15 MR. TROY: Correct, Your Honor.

16 THE COURT: Okay, and am I right to assume that
17 your clients have a concern that if the entire universe
18 of photographs is not addressed in this lawsuit, that it
19 will just be a whack-a-mole game of trying to figure out
20 what they can and can't post and potentially be
21 subjecting themselves to future lawsuits if they post
22 what they believe to be photographs that should be in
23 the public domain or something to that effect?

24 MR. TROY: Correct, Your Honor, but I would go
25 one step further. The whack-a-mole occurs long before

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we get to court --

THE COURT: Right, because you had the takedown orders and --

MR. TROY: -- we have the takedown, and as we all know, meta and all the other social media companies, they don't want to have anything to do with any of this, and --

THE COURT: They have a sensitivity when it comes to copyrighted material or allegedly copyrighted material.

MR. TROY: Correct, Your Honor.

THE COURT: Right. So you're going to argue that those fears are not reasonably founded despite a history of takedown issues and this lawsuit and that there's no standing to try to address this issue more broadly because you really think it should just be limited to the ones that are part of your pleadings.

MR. TROY: Absolutely.

THE COURT: Okay, well, we'll see. That's an interesting legal question. I don't think it's a slam dunk as a motion to dismiss for sure. But we'll see. And it's a strategic choice at some level for you to make I guess, Mr. Salta, because it would seem to be beneficial at some level to get some clarity on these

1 issues and not just piecemeal. But I understand that a
2 piecemeal approach leaves you and your clients with a
3 bit more flexibility to test these issues in future
4 cases, although I would think that if the matter is
5 litigated as to several photographs here, if there were
6 to be future litigation, there would be arguments about
7 the estoppel effect of the decisions, whatever they
8 might be, from this case. Which is all the more reason
9 to actually just address it all at once, but there might
10 be reasons that are past my understanding for why it's
11 better to do it as, you know, a thousand separate two-
12 photograph litigations rather than one single 2,000
13 photograph litigation.
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15 MR. SALTA: Well, that's why we figure having
16 an inspection, you know, looking at everything, Mr. Troy
17 will have access to all the photographs, everything, and
18 he'll be able to, once everything's resolved in this
19 case, will be able to adequately consult with his
20 clients as to what's proper and what's not. You know,
21 he's getting the material.

22 THE COURT: Except after this case is over, he
23 has to return or destroy those photographs. So that's
24 not going to be of great ongoing utility to him and his
25 clients. So I don't accept that as a rationale

1 particularly, and I just, from a perspective of judicial
2 efficiency and administration, the idea of being
3 bombarded with hundreds of these lawsuits, one or two or
4 three or five photographs at a time, just doesn't seem
5 to make a whole lot of sense.

6
7 MR. SALTA: I understand, Judge.

8 THE COURT: All right, I mean I guess the
9 question is, so it sounds like this is going to be teed
10 up for Judge Karas. I'll let him to expect your letters
11 next week. Melissa, can you just confirm that Judge
12 Karas does, in fact, have a premotion conference
13 requirement for filing motions to dismiss? I'm pretty
14 sure he does, but it's worth doublechecking.

15 MR. TROY: I believe he does.

16 THE COURT: I'm almost positive he does, but we
17 can look it up right now. I guess the question then
18 becomes whether it makes sense to still work through
19 these issues as to the interrogatories when the thrust
20 of the objection is that it's beyond the scope of what
21 should be included in the discovery in the case because
22 from the plaintiff's point of view/third-party
23 defendant's point of view, the interrogatories are
24 overbroad in that they address photographs that are
25 outside the scope of what should be included. What're

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2 your thoughts on that, Mr. Troy?

3 MR. TROY: Well, I think Your Honor actually
4 hit the name on the head so to speak, and that is is
5 that I think Mr. Gallagher should look at this as I'm
6 doing him a favor because by --

7 THE COURT: I'm sure he thinks that. I'm sure
8 he'll thank you afterwards.

9 MR. TROY: -- by actually dealing with all of
10 these at one time, we had the opportunity to have a
11 little more certainty as to what he claims in the
12 copyright in the archive.

13 THE COURT: You could lose on that argument -

14 MR. TROY: I could absolutely lose.

15 THE COURT: And then Mr. Gallagher's hand will
16 be strengthened. So I mean in that sense yes. Look, I
17 mean, again, this has obviously been a dispute that has
18 been ongoing for years. I'm new to it. So I'm sure, as
19 with most cases that come before me, you know a lot more
20 about it than I do and the particulars and nuances of
21 why you've chosen to plead it in the way that you have.
22 So I'm not suggesting that I know best when it comes to
23 this. It just seems that the way this is potentially
24 being set up is just not very efficient. All right,
25 point taken. I doubt that Mr. Gallagher's actually

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2 going to thank you, but I understand your point.

3 On the point of the interrogatories though, my
4 instinct here is that we should probably defer further
5 discussion of that because a big part of the objection
6 is as to the scope and what is the proper scope of this
7 case. Do you agree or disagree?

8 MR. TROY: I do agree, Your Honor, but my
9 question is is what happens after we sit here today and
10 you've ordered for the plaintiff to file motion letters
11 with Judge Karas, and they later chose not to.

12 THE COURT: Well, if they don't file, then by
13 Monday, as I've ordered - hold on.

14 (pause in proceeding)

15 THE COURT: (indiscernible) copy to the court
16 and file on ECF. Then conference, and he'll set up -
17 yeah, okay, so yes. So they have to file it by Monday.
18 If they don't file it by Monday because, look, they're
19 going to go back and talk about it, and they'll have a
20 discussion about whether they're sure they really want
21 to spend the time and money filing this motion to
22 dismiss for lack of standing. And if they decide to do
23 it, then they'll do it. And if not, then we'll come
24 back next week or the week after at the latest and we'll
25 go through the interrogatories.

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2 I'll pay attention to the docket. I'll see if
3 the letter is filed or not. And if it's not, you should
4 expect a scheduling order from me next week setting
5 another date for a conference for us to all come back
6 here. We'll pick up where we left off. In the meantime
7 the inspection I think should still proceed because if
8 anything part of the argument from the plaintiff seems
9 to be that that inspection might accomplish some of the
10 efficiency goals that I am suggesting would be
11 accomplished by allowing the lawsuit to proceed in its
12 current form, but I'm not sure if, how that's going to
13 play into the premotion conference letters.

14 But you should at least spend some time this
15 week thinking about the protective order, getting that
16 submitted to me. And if there's not going to be a
17 motion which would potentially if successful limit the
18 scope of the litigation, then we'll absolutely come back
19 and address these issues promptly.

20 So with that understanding, would you agree,
21 Mr. Troy, that it makes sense to hold off and see what
22 the next step is from the plaintiff/third-party
23 defendant?

24 MR. TROY: Who am I to disagree with you, Your
25 Honor.

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2 THE COURT: No. I don't mean to suggest that a
3 person cannot disagree with me. That's not my
4 suggestion at all. I'm seriously asking you because it
5 does seem like that's a big part of their objection, and
6 it's hard to address that with the potential uncertainty
7 about a motion to limit the scope of the case.

8 MR. TROY: My understanding is is that if, in
9 fact, then they do not file a motion to dismiss, then it
10 is all in, and then their objections are at least no
11 longer valid.

12 THE COURT: At least those objections. And
13 they have other objections it seems as well. But, yes,
14 when I say we'd come back and address these, I would
15 first ask you to try to address them amongst yourselves
16 because Mr. Salta has essentially conceded that the
17 current, and the whole purpose of filing a motion would
18 be because there is an acceptance that the third-party
19 complaint and the counterclaim do attempt to bring
20 within the ambit of this case the entirety of the
21 universe of copyrighted works. And so any objection
22 based on that would be not well taken if there's not
23 going to be a motion to dismiss because there's
24 essentially been a concession that that's part of the
25 case.

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2 So I think there'd be an opportunity if there's
3 not going to be a motion to dismiss for you to meet and
4 confer further and see if you could answer these
5 interrogatories without my having to be involved. But
6 we'll set a conference date so that that puts the onus
7 on you to do that promptly, and if you can't get it
8 sorted out, then we'll come back and I'll walk through
9 them one by one. We've now spent a good amount of time
10 here laying the foundation, and it'll be easy to pick up
11 from here in two weeks or less if that's appropriate.

12 Mr. Salta, does that approach seem sensible to
13 you?

14 MR. SALTA: It's perfectly sensible, yes,
15 Judge.

16 THE COURT: Okay, so Monday, no later than
17 Monday you'll file your premotion conference letter
18 should you chose to proceed that way. Of course, you
19 are completely at liberty to decide not to do that once
20 you have a more detailed strategic discussion. I mean
21 the benefit of Mr. Gallagher having been here is he's
22 heard everything I've had to say for better or for
23 worse. And so you'll be able to think through that and
24 talk to Mr. Knull about it and decide how you want to go
25 about it.

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2 MR. SALTA: Yeah.

3 THE COURT: Okay, that all makes sense. And it
4 turns out that Mr. Salta was prepared. So that was
5 great. People come and, especially for counsel who, you
6 know, have different types of practice and some people
7 don't come to court that often, it's not uncommon for
8 that kind of thing to happen.

9 All right, is there anything else that we
10 should address - so let's come back to this last issue
11 that I started out at the beginning with respect to
12 discovery into communications with this Transparency
13 Project entity. Is that something you're prepared to
14 address today, Mr. Salta, because, again, I'm not really
15 sure that I've been given much of an explanation for why
16 that discovery is necessary. It may be also something
17 that's worth putting off until next time.

18 MR. SALTA: Well, okay, in a nutshell, the
19 third count of the complaint alleges false information
20 being disseminated, false and inaccurate information by
21 Mary Kelly. Obviously, information has been imparted to
22 her, and she has disseminated information to all over
23 the place online. My client's been called a felon, a
24 scam artist, it's all over the place. I don't know if
25 Your Honor saw the New York Times article --

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2 THE COURT: I did see it --

3 (interposing)

4 MR. SALTA: That was promoted by these people.
5 So inasmuch as we have that allegation, that 43(a) I
6 believe allegation in the third count, this is relevant.
7 It's relevant to damages, to her state of mind, intent.
8 These things are relevant given what's transpired even
9 post service of the complaint kept going.

10 THE COURT: Okay. I mean part of the argument,
11 again, this I don't really feel has been teed up for me
12 in a way that's entirely ready for my review today, so
13 we may have to come back here in two weeks to discuss
14 this issue regardless of what happens with the motion to
15 dismiss.

16 I'm looking the complaint, the unfair
17 competition claim under the Lanham Act. It's not clear
18 to me that that gives rise to a basis for a request for
19 all communications with a large group of individuals,
20 and part of the response is that there's a privilege
21 issue because of the litigation funding relationship,
22 and that's something, if that's Mr. Troy's position,
23 that I probably need to see some briefing on in part --

24 MR. SALTA: We never received a privilege log.

25 THE COURT: Right, I was going to say in part

1
2 because there would have to be some declarations
3 attesting to the exact nature of the relationship so
4 that I could evaluate the privilege claim, separate and
5 apart from evaluating the legal claim about privilege
6 vis-à-vis communications of litigation funders. But
7 that, again, all of that is just not really ripe here
8 for my determination. Mr. Troy, I'll just give you a
9 minute to give me your view on that so I can think about
10 it a little bit in the interim.

11 MR. TROY: I think you hit the nail on the head
12 with respect to privilege, and I actually addressed that
13 briefly in one of my letters to Mr. Knull. But the
14 43(a) claim is spurious at best. I mean if you read
15 through there and you know about the Lanham Act, there's
16 a single word of trademark or trade dress in the entire
17 unfair competition, and this is indicative of what I've
18 seen in a number of unfair cases that have claimed
19 unfair competition in the past, that this is not, even
20 though they may think this is unfair competition, it
21 does not fall under the Lanham Act under 43(a). But if
22 I need to brief that, I will do so.

23 THE COURT: Yeah, I mean I did see, you know,
24 you mentioned, I happen to have it on the top of my pile
25 here because I had been looking at this before the

1
2 conference. The letter that you sent, Mr. Troy, to Mr.
3 Knull on October 11, you do - I think this is the letter
4 you're referring to where you do refer to some of the
5 case law on litigation funding communications.

6 MR. TROY: Yes.

7 THE COURT: So I've seen the beginning of that.
8 I don't think there was anything in there about the
9 Lanham Act. But as far as whether the Transparency
10 Project is actually a litigation funder or not, that
11 your representation, plaintiff seems to dispute that, I
12 would need some submissions on that just as a factual
13 matter to be able to evaluate the privilege claim.

14 So let's take stock of where we are after next
15 week. I will make a notation on my case tracking
16 spreadsheet to follow up with a scheduling order by the
17 end of next week one way or the other because we'll need
18 to think about how we're going to move forward with
19 discovery, whether it makes sense to move forward with
20 discovery in a limited way even while a motion is
21 pending if a motion is going to be filed or whether it
22 makes sense to stay discovery and come back to it at
23 some later point.

24 The problem is that if a motion is filed,
25 there's going to be delay because Judge Karas, like all

1 the district judges in this district and in particular
2 in this building, has got a long list of motions to
3 decide. So it's unlikely that it would be addressed
4 immediately, especially because standing issues require
5 nuanced analysis like many other motions do. So I'm not
6 sure exactly which way that would cut in terms of the
7 parties' views on discovery, but rather than engaging in
8 a multilayers hypothetical exercise about scheduling
9 now, I'm going to see where we are come next Thursday or
10 Friday in terms of whether the premotion letter has been
11 filed, whether the parties have had any discussions in
12 advance of those premotion letters about what should be
13 done about discovery. You should think about it, talk
14 to each other about it. You could include that in your
15 premotion letters to Judge Karas because ultimately he
16 would have to approve of any stay of discovery if that's
17 how you want to go about it. And then I'll follow up
18 with the scheduling order at the end of the week,
19 depending on what you've said if anything to Judge Karas
20 about the motions and how discovery should be handled.
21 Okay?

22
23 MR. TROY: Okay.

24 MR. SALTA: Thank you, Your Honor.

25 THE COURT: All right, is there anything

1
2 further that we should address then today from a
3 plaintiff's perspective, Mr. Salta?

4 MR. SALTA: No, Judge.

5 THE COURT: All right, Mr. Troy, anything from
6 the defendant's perspective/third-party plaintiffs,
7 etc.?

8 MR. TROY: No, Your Honor, I thank you very
9 much for addressing I think the issues that were before
10 the Court.

11 THE COURT: Okay, thank you both. It's nice to
12 meet you all in person, and we'll be back together again
13 whether soon, sooner or later because even if there's a
14 motion and even if it's granted, there will be more
15 litigation to come in this case. So I will see you when
16 I see you. Stay safe and stay healthy, everybody, take
17 care.

18 MR. TROY: Thank you.

19 MR. GALLAGHER: Thank you, Your Honor.

20 MR. SALTA: Thank you, Your Honor.

21 (Whereupon the matter is adjourned.)
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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, RICHTONE DESIGN v. KELLY, et al., Docket #22cv1606, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature

Carole Ludwig

Carole Ludwig

Date: May 4, 2023